

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

IN RE: )  
 ) CA No. 01-12257-PBS  
PHARMACEUTICAL INDUSTRY AVERAGE )  
WHOLESALE PRICE LITIGATION ) Pages 1 - 35  
 )

TRACK TWO FAIRNESS HEARING  
BEFORE THE HONORABLE PATTI B. SARIS  
UNITED STATES DISTRICT JUDGE

United States District Court  
1 Courthouse Way, Courtroom 19  
Boston, Massachusetts 02210  
November 22, 2011, 2:57 p.m.

LEE A. MARZILLI  
OFFICIAL COURT REPORTER  
United States District Court  
1 Courthouse Way, Room 3205  
Boston, MA 02210  
(617) 345-6787

## 1 A P P E A R A N C E S:

2  
3 SEAN R. MATT, ESQ., Hagens Berman Sobol Shapiro, LLP,  
1918 Eighth Avenue, Suite 3300, Seattle, Washington, 98101,  
4 for the Class Plaintiffs.

5 EDWARD NOTARGIACOMO, ESQ., Hagens Berman Sobol Shapiro, LLP,  
55 Cambridge Parkway, Suite 301, Cambridge, Massachusetts,  
6 02142, for the Class Plaintiffs.

7 JOHN A. MACORETTA, ESQ., Spector, Roseman, Kodroff &  
Willis, P.C., 1818 Market Street, Philadelphia, Pennsylvania,  
8 19103, for the Class Plaintiffs.

9 KENNETH A. WEXLER, ESQ., Wexler Wallace, LLP,  
55. W. Monroe Street, Suite 3300, Chicago, Illinois, 60603,  
10 for the Class Plaintiffs.

11 MARC H. EDELSON, ESQ., Edelson & Associates,  
45 West Court Street, Doylestown, Pennsylvania, 18901,  
12 for the Class Plaintiffs.

13 STEVEN F. BARLEY, ESQ., Hogan Lovells, LLP,  
100 International Drive, Suite 2000, Baltimore, Maryland,  
14 21202, for Amgen Corporation.

15 PETER W. MORGAN, ESQ., Dickstein Shapiro, LLP,  
1825 Eye Street, N.W., Washington, D.C., 20006-5403,  
16 for Baxter International, Inc.

17 JAMES W. MATTHEWS, ESQ., K & L Gates, LLP,  
One Lincoln Street, State Street Financial Center, Boston,  
18 Massachusetts, 02111, for Watson Pharmaceuticals, Inc.

19 JAMES P. MUEHLBERGER, ESQ., Shook, Hardy & Bacon, LLP,  
2555 Grand Boulevard, Kansas City, Missouri, 64108-2613,  
20 for Aventis Pharmaceuticals, Inc.

21 J. CLAYTON EVERETT, JR., ESQ., Morgan, Lewis & Bockius,  
LLP, 1111 Pennsylvania Avenue, N.W., Washington, D.C., 20004,  
22 for Pharmacia Corporation.

23 TINA M. TABACCHI, ESQ., Jones Day,  
77 West Wacker, Chicago, Illinois, 60601-1692,  
24 for Abbott Laboratories.

25 SARA JANE SHANAHAN, ESQ., Sherin and Lodgen, LLP,  
101 Federal Street, Boston, Massachusetts, 02110,  
for Sicor, Inc.

1 A P P E A R A N C E S: (Continued)

2 MICHAEL DOSS, ESQ., Sidley Austin, LLP,  
3 One South Dearborn, Chicago, Illinois, 60603,  
4 for Bayer Corporation.

5 CHRISTOPHER C. PALERMO, ESQ., Kelley Drye & Warren, LLP,  
6 101 Park Avenue, New York, New York, 10178,  
7 for Dey, Inc.

8 ANDREW L. HURST, ESQ., Reed Smith, LLP,  
9 1301 K Street, N.W., Suite 1100, East Tower, Washington, D.C.,  
10 20005, for Fujisawa USA, Inc. and Fujisaw Healthcare.

11 ALSO PRESENT:

12 KILA B. BALDWIN, ESQ., Kline & Specter, PC,  
13 1525 Locust Street, 19th Floor, Philadelphia, Pennsylvania,  
14 19102.

15 ADAM S. LEVY, ESQ., Law Office of Adam S. Levy, LLC,  
16 P.O. Box 88, Oreland, Pennsylvania, 19075.  
17  
18  
19  
20  
21  
22  
23  
24  
25

## P R O C E E D I N G S

THE CLERK: Court calls Civil Action MDL 01-12257,  
In Re: Average Wholesale Litigation. Could counsel please  
identify themselves for the record.

MR. MATT: Your Honor, good afternoon. Sean Matt for  
class plaintiffs.

MR. NOTARGIACOMO: Ed Notargiacomo for class  
plaintiffs, your Honor.

THE COURT: Thank you.

MR. MACORETTA: John Macoretta for the class  
plaintiffs. Good afternoon, your Honor.

MR. WEXLER: Ken Wexler, your Honor, for the class  
plaintiffs.

MR. EDELSON: Marc Edelson for the class plaintiffs.

MR. BARLEY: Steven Barley for Amgen.

MR. MORGAN: Peter Morgan for Baxter.

MR. MATTHEWS: Good afternoon, your Honor. James  
Matthews for Watson.

MR. EVERETT: Clay Everett for Pharmacia.

MR. PALERMO: Good afternoon, your Honor. Chris  
Palermo for Dey.

MR. DOSS: Mike Doss on behalf of the Bayer  
defendants.

MR. MUEHLBERGER: James Muehlberger on behalf of  
Aventis.

1 MS. TABACCHI: Tina Tabacchi for Abbott Laboratories.

2 MR. HURST: Andrew Hurst for Fugisawa USA and Fugisawa  
3 Healthcare.

4 MS. SHANAHAN: Sara Shanahan for Sicor.

5 THE COURT: Is that it? Please be seated. Is there  
6 anyone here who has filed an objection?

7 MS. BALDWIN: Kila Baldwin from the law firm of Kline  
8 & Specter. I was here on the motion for modification of lead  
9 counsels' allocation of fees, which it's my understanding that  
10 it's not ripe at this time; they haven't had the opportunity to  
11 respond. And it wasn't styled as an objection, it was styled  
12 as a motion, but I am here. I wanted to enter my appearance.

13 THE COURT: So I'm not understanding because I'm  
14 actually just seeing it for the first time. So it's about  
15 attorneys' fees but not about the substance of the settlement,  
16 is that correct?

17 MS. BALDWIN: Correct. It's about the allocation of  
18 attorneys' fees among counsel.

19 THE COURT: Okay, all right, that is something I do,  
20 but that's not really -- let me, if I can, hold on that for a  
21 second.

22 MS. BALDWIN: Absolutely, your Honor.

23 THE COURT: And is there anyone here who has filed an  
24 objection to the class settlement? I note for the record that  
25 certain objections have been withdrawn. For the record, which

1 ones are those?

2 MR. MATT: Your Honor, Sean Matt again for the  
3 plaintiffs. The ones that have been officially withdrawn are  
4 Docket No. 7852, Mr. Iglesias.

5 THE COURT: So let me just get this. Say it again.

6 MR. MATT: Docket No. 7852, Mr. Iglesias, the  
7 objection has been resolved and withdrawn.

8 Docket No. 7917, that's Nancy Wildes on behalf of her  
9 father, Robert Wildes. That has been resolved and withdrawn.

10 Mr. William Fairey, Docket No. 7842, that objection  
11 has been resolved. He's not submitted anything to the court  
12 withdrawing it, but we don't think he's going to. He's pleased  
13 with the resolution, I can report, your Honor.

14 Carol Geiselhart, Docket No. 7854, that objection is  
15 also resolved, and we believe that she is pleased with the  
16 resolution.

17 Phyllis Granat, Docket No. 7840, that one is resolved.

18 Cynthia Schubert, Docket Nos. 7883 and 7841, we  
19 assisted this class member with obtaining the documentation  
20 necessary to determine that she was a member of Class 1 and  
21 also to substantiate the drug administrations. Mr. Schubert,  
22 who I talked to, they're still considering whether they want to  
23 submit a late request for exclusion, so I can't tell you that  
24 it's a resolved issue, but we just haven't heard back.

25 That leaves, your Honor, objection from Juanita

1 Bethune, who had objected to the attorneys' fees. We don't  
2 believe that's a valid objection. The objection is that we're  
3 permitted during the rebalancing notice, were objections to be  
4 limited solely to revisions to the settlement, and the  
5 attorneys' fees was not part of the revision. That is an  
6 objection that should have been made months ago, and we believe  
7 that that's not a valid objection because it's tardy.

8 And then we have two more objections --

9 THE COURT: Say that again. So Bethune didn't file  
10 something with this court.

11 MR. MATT: Correct. The objection is also invalid  
12 because he didn't follow the proper procedures. He sent the  
13 objection to the claims administrator, and it filtered its way  
14 to us.

15 THE COURT: Have I seen it? Did you submit it?

16 MR. MATT: I don't know if we have submitted it to the  
17 Court. I don't think we have, other than just putting it on  
18 the chart that we submitted with Document No. 7918. I'm sorry,  
19 I didn't hear your question, your Honor.

20 THE COURT: And you think it's only to the amount of  
21 the attorneys' fees?

22 MR. MATT: Correct.

23 THE COURT: Because what did we do? We put in the  
24 percentage, is that what we did?

25 MR. MATT: We asked for 30 percent, and your Honor has

1 indicated that your preference would be 28 percent on the  
2 consumer portion and then 30 percent on the --

3 THE COURT: All right.

4 MR. MATT: We put in the notice we would apply for up  
5 to 33 1/3.

6 THE COURT: And so that's what he was objecting to?

7 MR. MATT: Correct.

8 THE COURT: Up to the 33 percent?

9 MR. MATT: Correct. Again, it should have been made  
10 months ago when the original notice --

11 THE COURT: But, in any event, it's not 33 percent.  
12 Was he objecting to any?

13 MR. MATT: He just said the fees are too high in  
14 relationship to the amount of the award, of the settlement  
15 itself. It was a very short one-paragraph objection.

16 Another objection from Margaret Wild, Docket No. 7830.  
17 She was objecting to providing documentation supporting  
18 administration of drugs assigned the unclassified J-Code. We  
19 sent her a letter explaining why the documentation was needed.  
20 We left a voicemail for her as well to try and help out, and we  
21 haven't heard back from her at all. So either she is satisfied  
22 with the explanation or she's not, and she's just not --

23 THE COURT: So Ms. Wild?

24 MR. MATT: Ms. Wild, yes, W-i-l-d.

25 And then, lastly, there was an objection submitted by



1 a man named Todd Ivey, who was asking why the original  
2 co-pay-based method for calculating the Group A drug recovery  
3 was replaced with the damage-based method. We've provided a  
4 letter explaining why this change was made, basically to tie  
5 the Class A drug recovery to actual damages as we've done in  
6 prior settlements. We've not heard back from Mr. Ivey, so we  
7 don't know if the explanation satisfies his question.

8 THE COURT: So we potentially have -- were these three  
9 people operating pro se?

10 MR. MATT: They were. There's no indication that  
11 they're represented by counsel.

12 THE COURT: All right. Now, there were various  
13 objections that -- I'm assuming no one here is one of those  
14 three people, is that right? That's Bethune, Wild, or Ivey.  
15 All right, some of those came to the court, and we forwarded  
16 them on.

17 All right, so there were other objections that were  
18 withdrawn; for example, by Mr. Haviland and various others  
19 represented by counsel.

20 MR. MATT: That's correct, so the withdrawn objections  
21 from the original notice of settlement that went out are: Don  
22 Haviland's clients have withdrawn. You've granted that motion  
23 to withdraw their objections.

24 THE COURT: Right.

25 MR. MATT: John Pentz, his client, who is his father,

1 has withdrawn his objection. Patricia Weatherly, who is  
2 represented by Richard Landrigan, has recently withdrawn her  
3 objection. And Mr. Wilson, I can't remember who is  
4 representing Mr. Wilson, but his objection has been withdrawn  
5 as well. So that leaves one objection.

6 THE COURT: From the initial settlement?

7 MR. MATT: From the initial set represented by a  
8 counsel. That's Corinna Connick, and we're embroiled in a  
9 substantial dispute with her as you --

10 THE COURT: Because she thinks she should have been in  
11 the class, right?

12 MR. MATT: She did. She didn't take a class drug.  
13 It's clear, your Honor has found that she didn't take a class  
14 drug. And she has filed a pro se appeal, purportedly pro se --  
15 I'll come back to why it's purportedly --

16 THE COURT: But how could she appeal? I haven't done  
17 anything yet.

18 MR. MATT: She filed an appeal from your order denying  
19 her motion to intervene.

20 THE COURT: I see. How long ago was that filed?

21 MR. MATT: That was filed five or six weeks ago.  
22 She's already missed her docketing deadline in the First  
23 Circuit. We have noted her deposition because we want to know  
24 whether she has the ability to post a bond, and we also want to  
25 know whether she's truly proceeding pro se. We have since

1 learned that she's really not, and that the lawyer that  
2 represented her here, a guy named Ed Cochran, by all  
3 appearances has ghost written, in a derogation of First Circuit  
4 rules, the opposition to the bond motion that we filed.

5 We tried to take her deposition. She failed to  
6 appear. And in fact the deposition was going to be taken by my  
7 co-counsel, Ken Wexler; and Corinna Connick's husband has now  
8 sued Ken Wexler in the Northern District of Ohio to quash the  
9 deposition notice. So the appeal itself is frivolous in the  
10 extreme. Here we have a person who's not a class member who  
11 wants to be part of the settlement that she feels is deficient.  
12 Your Honor, for lack of a better expression, it's a shakedown.

13 THE COURT: It's on appeal, so there's nothing I can  
14 do with it, right?

15 MR. MATT: Well, we have filed a motion to impose a  
16 bond, an appellate bond, similar to what you did when you  
17 approved the GSK settlement.

18 THE COURT: What's the timing usually of that?

19 MR. MATT: I believe the briefing is complete on that,  
20 your Honor. We filed a motion. They filed their opposition on  
21 Friday, and then we filed leave to file a supplemental brief  
22 yesterday, which your Honor granted yesterday, and we filed  
23 that brief. So the briefing itself is closed.

24 The timing of the appeal is that if that appeal goes  
25 forward, defendants will take the position that we don't have

1 the effective date and finality under the settlement. So it  
2 will hold up distribution of the settlement for at least twelve  
3 months, and for that reason, we filed a motion for imposition  
4 of a bond because we've documented quite clearly that there is  
5 going to be at least \$196,500 in additional administration  
6 costs caused by that appeal.

7 THE COURT: I'm concerned that they view the amount as  
8 being punitive to an extreme that no person could afford it,  
9 especially the kind of -- who's Ms. Connick? Is she an old  
10 person?

11 MR. MATT: No. She's married to an attorney, a  
12 practicing attorney in Cleveland, who just appeared on her  
13 behalf Friday.

14 THE COURT: Is anyone here for Ms. Connick, any of the  
15 attorneys? No.

16 So she's putting all her eggs in the motion to  
17 intervene because she's not part of the class right now.

18 MR. MATT: Correct, which again underscores frivolity.

19 THE COURT: Since I don't have her -- well, I don't  
20 have her -- she hasn't filed an appeals brief yet? It's hard  
21 to figure out what the -- what's the challenge, that I abused  
22 my discretion in not allowing her to intervene? Is that it?

23 MR. MATT: Correct.

24 THE COURT: And have you explained in your briefs,  
25 since I haven't really gotten to it, why it is that she just

1 clearly doesn't have a class drug?

2 MR. MATT: We did, and you agreed and said as much in  
3 your order denying the intervention. But in a nutshell --  
4 actually, not a nutshell. I can explain the whole thing. That  
5 is, it's Climara. It's not listed in any complaint. The drug  
6 that she took is Climara. It's not listed in any complaint.  
7 It's not on the class drug list. It was never a part of the  
8 litigation. It's not part of the settlement release.

9 THE COURT: Is it an equivalent generic drug?

10 MR. MATT: A generic version of Climara is estradiol,  
11 and it is part of the case.

12 THE COURT: So that's what she's upset about, the  
13 brand name?

14 MR. MATT: The brand name is not; the generic was.  
15 It's just not part of the case. We never did any discovery on  
16 it. It's clear, the record is clear, crystal clear it's not  
17 part of the case.

18 THE COURT: So what are they arguing on appeal, that I  
19 erred in not expanding it to include that drug?

20 MR. MATT: Her argument is that, against all the  
21 evidence, of course, that it is a class drug.

22 THE COURT: Do I have evidence of that other than it's  
23 not listed?

24 MR. MATT: There's no evidence whatsoever that it is a  
25 drug that's covered by the settlement or was ever in the

1 litigation.

2 THE COURT: All right, so I'm hoping that that's all  
3 in there because if I have to write an opinion, you can't just  
4 say, "I impose a bond." And so explain to me what the amount  
5 would be again?

6 MR. MATT: So the amount would be -- and this is, just  
7 for your understanding, the amount is high, but it's not set to  
8 be punitive. It's set to be recoverable costs that are  
9 authorized by the Rules of Appellate Procedure and by case law.  
10 It's \$196,500 for extra administration costs. We have  
11 submitted an evidentiary foundation for that in the form of --

12 THE COURT: Well, why would it be extra?

13 MR. MATT: Here's why. Dan Coggeshall submitted a  
14 declaration explaining this, so it's in the record. The  
15 settlement administrator, if this thing gets put on hold for  
16 twelve months, still has to work it. And what they have to do  
17 is, they have to respond to a large volume of calls from class  
18 members, calls that will increase as time goes on, people  
19 wondering where their money is. They get calls all the time.  
20 They're going to have to continue to field those calls over the  
21 next year, and the problem is, the volume of those calls will  
22 increase substantially as time goes on.

23 THE COURT: That just seems like too high because you  
24 have to have them in place anyway as you're distributing the  
25 money. So I'm just trying to figure out what a fair amount is.

1 MR. MATT: Well, if they don't have to respond --  
2 well, they still have to maintain the website, they still have  
3 to maintain the P.O. box number, but the bulk of the expenses  
4 are associated with answering the telephone for those calls,  
5 and --

6 THE COURT: But they still have to do that in the next  
7 year, don't they?

8 MR. MATT: No, because the settlement will be -- if we  
9 achieve finality, okay, that will happen, if you sign an order  
10 in the next week, that will happen the end of December.

11 THE COURT: I am going to sign an order, and as far as  
12 I'm concerned, I don't see why you can't distribute it.

13 MR. MATT: We can hear from defendants on that, but I  
14 think there's an effective date that they may take the position  
15 is not met unless all appeals have been resolved.

16 THE COURT: Have you looked it up?

17 MR. BARLEY: I've looked at the settlement agreement,  
18 and the definition of what is final is when the litigation is  
19 over, including all appeals. I can read it if I can find it.

20 THE COURT: So this isn't really an appeal of the  
21 settlement. It's an appeal of the denial of the motion to  
22 intervene.

23 MR. MATT: Let me clarify that. That's correct, but  
24 she also objected to the settlement. That's what's coming next  
25 if she was allowed to intervene, okay. She still has an

1 objection out there to the settlement.

2 THE COURT: I see.

3 MR. MATT: And so, you know, presumably she's going to  
4 appeal that once you sign the final approval order.

5 MR. BARLEY: And we obviously don't want the money  
6 distributed until we're sure that that's the end of it.

7 "Final" is defined in the settlement agreement: "Final or  
8 final approval of this agreement means that the time has run  
9 for any appeals from a final approval order of the MDL court or  
10 any such appeals have been resolved in favor of this  
11 agreement."

12 THE COURT: That's a little vague on this  
13 circumstance.

14 MR. MATT: We're all in favor of distributing --

15 MR. BARLEY: -- I think was not to distribute the  
16 funds until it was clear that it wouldn't be attacked in any  
17 way collaterally or on appeal or whatever, you know, that we  
18 had a bulletproof final judgment. I think that's in  
19 everybody's best interests. I mean, we're as anxious as  
20 anybody to get this over with and everything. We just want to  
21 make sure that there's not anything hanging out there, your  
22 Honor.

23 THE COURT: Thank you. But how long do you think you  
24 have to keep this place open, even if she didn't appeal?

25 MR. MATT: Well, if she didn't appeal, then I think



1 you're looking at time to distribution from final finality. If  
2 that's the end of December, it would be April to May that they  
3 actually have to -- it will take them that long to process  
4 everything and make sure that all the deficient claims are  
5 cured that are going to be cured, et cetera. So I think it's  
6 probably three to four months to get the checks out.

7 THE COURT: So you'd have to keep it open anyway.

8 MR. MATT: That's correct.

9 THE COURT: And so you're saying they can be doing  
10 that anyway because the odds of this succeeding are pretty low.  
11 So the extra amount of time would be what if it's --

12 MR. MATT: Let's call it eight months. That's if the  
13 First Circuit rules within twelve months, and, of course,  
14 there's no guarantee of that. It could be longer than twelve  
15 months. We just had the claims administrator do a declaration  
16 based on a twelve-month delay. It could be longer.

17 THE COURT: I will be imposing an appeal bond, but I  
18 don't know how much.

19 MR. MATT: Okay.

20 THE COURT: And I don't know how long it will take me  
21 to write it up, and so -- I actually shouldn't even say that  
22 because I haven't read her opposition yet, but I do think it's  
23 a frivolous appeal. So unless she persuades me that there's  
24 something that I didn't catch last time around, that's where  
25 I'm likely to go.

1           Anyway, why don't you file your motion, assert your  
2 motion. I pretty much know this case. I was hoping for sort  
3 of a summary for the record all in one place of what the final  
4 settlement is.

5           MR. MATT: And we have filed already a proposed final  
6 approval order. That was filed a couple of years ago, and some  
7 things have changed since then, so we're filing --

8           THE COURT: Right, I was hoping I was going to get  
9 that actually.

10          MR. MATT: Yes, we actually should have by now at  
11 3:15, hopefully my legal assistant has sent a red-lined version  
12 of that to defendants for them to review. Our goal was to file  
13 that with your Honor tomorrow with the opt-outs. We have to  
14 attach all the opt-outs to it so that they're not bound by the  
15 order.

16          THE COURT: Tomorrow is the day before Thanksgiving.  
17 I'm just trying to figure out, what's taken so long here?

18          MR. MATT: We had to gather all the opt-outs, and they  
19 keep coming in. Even though the opt-out deadline was the end  
20 of October, if they come in a little bit late, we tend to honor  
21 them.

22          THE COURT: All right, so in this memo -- I would  
23 rather have it after Thanksgiving if it's more complete -- what  
24 I would like is a complete summary because we kept changing  
25 this because I wasn't happy with it. And I took very

1 detailed -- paid very close attention, as did everyone in this  
2 room, to how we allocated among the groups and among the drugs.  
3 And how many times did we change it? Was it twice or once?

4 MR. MATT: Well, there were three different proposals,  
5 but it's only changed once, and that was what was contained in  
6 the notice that went out to the --

7 THE COURT: That's the notice that finally went out,  
8 that's right, because before it was all in the preliminary  
9 approval phase. And so just I think in one place, especially  
10 if it goes up on appeal, a complete explanation of how much  
11 money there is, and why we allocated it to one pot rather than  
12 another pot, and what the principled basis was for doing that  
13 because we did go through this in extensive detail. And I  
14 think you probably should also put forward, procedurally  
15 speaking, to the extent that it's similar or dissimilar to the  
16 way we did other settlements and why. And perhaps you could  
17 also put in a paragraph so that they understand it about which  
18 drugs were included, where you find that, and list them so that  
19 they can see in an attachment, because this docket is  
20 impossible for an appellate court to follow, as we all know by  
21 now, so we'll have in one place where everything is. Is that  
22 essentially what you were planning on giving me?

23 MR. MATT: It is, your Honor. Actually, most of what  
24 you just said is already in the draft we sent the defendants,  
25 but we will add a few more things.

1 THE COURT: I have my law clerk, who's brand-new and  
2 has to navigate that horrible docket, it's so complicated, I  
3 said, "Are you sure it's not there? Are you sure it's not  
4 there?" And he gave me all these old memos that were, you  
5 know, submitted that are partly correct and partly not and that  
6 sort of thing. It would be useful as well, if somebody were  
7 going to challenge the attorneys' fees, to explain the other  
8 litigation and what we've been paying and that sort of thing.

9 MR. MATT: Sure.

10 THE COURT: So did defense want to file something as  
11 well?

12 MR. BARLEY: It sounds like what Mr. Matt planned on  
13 doing was to send us a draft. To the extent we can agree on  
14 something jointly, I think it's in everybody's interest to do  
15 that. We'll take a look. If we have an issue, we'll try to  
16 work it out or submit something separately.

17 THE COURT: All right, can you file this all within a  
18 week?

19 MR. MATT: Absolutely, your Honor.

20 THE COURT: All right, that's fine.

21 MR. MATT: We still may be able to file tomorrow, but  
22 if not, we'll do it next Monday.

23 THE COURT: Tomorrow is the day before Thanksgiving.  
24 I am not reading it over the weekend. Let me make it crystal  
25 career. I've waited -- how many years has it taken to get this

1 done?

2 MR. MATT: Ten.

3 THE COURT: It's not going to be on Thanksgiving Day  
4 for me. So I appreciate it, it's a great gift if you get it  
5 tomorrow, but I don't want anyone spending the night. Most  
6 people are probably going home tomorrow, right?

7 MR. BARLEY: We'll file it next week then.

8 THE COURT: They're doing, like, family good things.  
9 So I don't want some associate up till 3:00 in the morning  
10 trying to -- or a partner. Just it's not worth it. A week  
11 from now is fine, all right?

12 THE CLERK: 12/2?

13 MR. BARLEY: Your Honor, could we have until the end  
14 of next week, only because we've got a number of parties, and  
15 we have to consult with our clients and make sure they're on  
16 board with everything.

17 THE CLERK: 12/2.

18 MR. BARLEY: 12/2? Thank you, your Honor.

19 THE COURT: The only thing, you're going to get it to  
20 them by tomorrow.

21 MR. MATT: Yes.

22 THE COURT: No one there, though, will be required to  
23 spend Thanksgiving looking at it. I will get it by Friday.  
24 After ten years, we can handle the week over Thanksgiving.

25 Okay, in the meantime, there is apparently -- unless I

1 hear something that I don't otherwise expect, no one's been  
2 objecting here. As far as I'm concerned, anything is untimely  
3 at this point except for this issue of attorneys' fees and  
4 allocation. And why don't you, could you please -- I forget  
5 your name already.

6 MS. BALDWIN: Sure. Kila Baldwin, Kline & Specter.

7 THE COURT: And what's the problem? Why don't you  
8 come up.

9 MS. BALDWIN: Sure.

10 THE COURT: Come on up. You're from Philly?

11 MS. BALDWIN: Yes, I am.

12 THE COURT: Well, welcome. What's the problem here?

13 MS. BALDWIN: We filed a motion, and it was just filed  
14 last week. I believe it was the 17th or the 18th, so they, in  
15 all fairness, haven't had a chance to respond, but it deals  
16 with, we're seeking a modification of the way they, I believe,  
17 intend to allocate the attorneys' fees in this case. Kline &  
18 Specter along with the other signatories to our motion, which  
19 would be Kent Williams of the Williams Law Firm and Jennings,  
20 Haug & Cunningham, did a significant amount of work in the  
21 state AWP actions before those claims were dismissed, and we  
22 would like an allocation that includes compensation for the  
23 time and expenses in those state court actions.

24 THE COURT: I have to admit I am so confused because I  
25 have so many AWP cases. Were these cases that I had remanded?

1 Why are the state cases relevant to this? Did they get  
2 dismissed in light of the federal case?

3 MS. BALDWIN: They were dismissed in light of the  
4 federal case. It was actually your order saying that the  
5 coordinated state court actions be dismissed. And we did that  
6 with the understanding that we had in place with lead counsel  
7 at the time that our state court work would be compensated in  
8 this federal MDL, and it appears as though lead counsel --

9 THE COURT: Was that ever put in writing?

10 MS. BALDWIN: There are e-mails evidencing that, and  
11 they're attached to the affidavit of Kent Williams which was  
12 filed in support of our motion.

13 THE COURT: And so I don't know how much 38 percent  
14 comes up to, but have you talked through, tried to negotiate  
15 this?

16 MR. MATT: Your Honor --

17 THE COURT: I didn't mean 38 percent, although your  
18 heart may have just leapt for joy.

19 MS. BALDWIN: We're not seeking 38 percent.

20 THE COURT: 28 and 30 percent.

21 MR. MATT: The motion was just filed last week. They  
22 certified that they met the local rule requirement by having a  
23 meet-and-confer with us. That is false. They did not. We  
24 were completely blindsided by the motion. We're, quite  
25 frankly, very upset by it. We have a response deadline of I

1 believe Thursday or Friday of next week. We'll be putting in a  
2 substantial opposition.

3 In summary, your Honor, without arguing the motion --  
4 I don't want the bell to go unring -- there was never an  
5 agreement signed by class counsel with Mr. Shannon's (Sic) firm  
6 to pay any of the costs or time in these other cases. And to  
7 be clear, they're trying to claim time here not just in AWP  
8 cases, for work done in other cases that weren't part of this  
9 case, but also for a Lupron case that certainly was never part  
10 of this case.

11 THE COURT: No, that wouldn't be successful here, but  
12 the other cases --

13 MR. MATT: And one of them is for time spent on their  
14 New Jersey case, which served as the predicate for your Honor's  
15 disqualification of Don Haviland. Just so that you know, the  
16 Specter --

17 THE COURT: I understand, but they're claiming that  
18 they dismissed in reliance on a promise to pay.

19 MR. MATT: They did not dismiss those cases. They  
20 were continuing to prosecute them. I think they're probably  
21 still prosecuting them. I don't know what the status is of  
22 them. We're not involved in them.

23 THE COURT: So I think these are things that you all  
24 need to talk about.

25 MS. BALDWIN: Your Honor, just for the record and so I



1 can be clear, I made several phone calls to Mr. Edelson who's  
2 here today about this subject, and Mr. Specter of my office  
3 sent several letters along these lines, and they have been  
4 ignored by lead counsel, which is why our filing was necessary.

5 THE COURT: Well, let me say just this: I am not  
6 going to hold up the settlement based on it, but I will hold up  
7 the payment of attorneys' fees.

8 MR. MATT: That's correct, your Honor, this has  
9 nothing to do with actually enacting the Track Two settlement.

10 MS. BALDWIN: I agree with that, your Honor.

11 THE COURT: And so how much money do you think you're  
12 owed collectively, this group of firms?

13 MS. BALDWIN: Collectively? One second. I actually  
14 gave your clerk, I believe it is, my copy of the motion, but I  
15 believe I did the math, and --

16 THE COURT: Well, why don't I give it back because I'm  
17 sure we can download our own.

18 MS. BALDWIN: I think we have it here as the total  
19 lodestar we're seeking among all the signatories to our motion  
20 to be \$2,335,575.89 and the total expenses to be \$195,210.79.

21 THE COURT: And is that just for AWP litigation  
22 involving these drugs?

23 MS. BALDWIN: It's for the AWP case that was in  
24 New Jersey, the Local 68 Operating Engineers.

25 THE COURT: Is that still ongoing?

1 MS. BALDWIN: The majority of the claims have been  
2 dismissed.

3 THE COURT: In light of this case?

4 MS. BALDWIN: In light of this case. Your Honor  
5 entered orders -- I believe I can give you approximate dates.  
6 Well, around November of 2007 and March of 2009, the majority  
7 of the claims in those cases were dismissed because of orders  
8 entered here.

9 MR. MATT: Those may have been as part of settlements.  
10 I'm just not familiar with it, your Honor.

11 MS. BALDWIN: And, your Honor, as part of the  
12 settle- --

13 THE COURT: Did you get money from those?

14 MS. BALDWIN: No, your Honor. We didn't seek any fees  
15 in any of those cases, with the understanding that we had with  
16 lead counsel that we would be compensated here.

17 THE COURT: Who's lead counsel?

18 MS. BALDWIN: I believe the majority of our dealings  
19 were with Mr. Edelson, but it was members of the Fee Committee.

20 THE COURT: Well, this may turn seemingly unfortunate  
21 if in fact it turns into depositions and fact disputes over  
22 whether or not there was a binding oral agreement.

23 MS. BALDWIN: There was an e-mail exchange between  
24 Shanin Specter of my office and Steve Berman and Tom Sobol  
25 dated October 15 of 2005. That's attached as Exhibit A to

1 Mr. Williams' memorandum and --

2 THE COURT: What did Mr. Berman say or Mr. Sobol?

3 MR. MATT: Those e-mails, your Honor -- I've reviewed  
4 them briefly -- they are negotiations.

5 THE COURT: Well, I don't know.

6 MR. MATT: And there is no agreement.

7 THE COURT: I say, at the end of this day, won't we be  
8 sorry campers if it takes me another two years to figure out  
9 the attorneys' fees issue by sitting here and either doing a  
10 master's hearing or a magistrate judge's hearing or me myself  
11 holding a little trial? I think it's worth trying to figure  
12 out. Why do you think you get lodestar? I don't even give  
13 them lodestar.

14 MS. BALDWIN: Well, your Honor, the point is, we want  
15 some allocation for the state time, and I'm just giving you  
16 what our total lodestars are; but right now it appears as  
17 though lead counsel wants to subtract out all of our work for  
18 the state time, so I'm telling you what our lodestar and  
19 expenses were in those cases.

20 THE COURT: And just on these drugs, or is it on the  
21 whole litigation?

22 MS. BALDWIN: It would be in each of those state court  
23 actions.

24 THE COURT: I wouldn't do that either because it's  
25 only the drugs that we're talking about here.

1 MS. BALDWIN: Well, the drugs that we were -- we  
2 adopted a strategy with the lead counsel to conduct discovery  
3 in those cases for the benefit of the class here, and lead  
4 counsel has put in pleadings with this court --

5 THE COURT: But I wouldn't pay you a penny, let me  
6 just say this, out of this class money unless it involves the  
7 drugs involved in this case and there was some value added.

8 MS. BALDWIN: I understand, your Honor, and --

9 THE COURT: So it can't be some drug that's not part  
10 of my class approval.

11 MS. BALDWIN: I understand, your Honor, and lead  
12 counsel has submitted in filings with this Court that our state  
13 court work was of value to members of the class, it was  
14 authorized by them, and that it actually did benefit the  
15 members of the class.

16 THE COURT: Did it benefit the members of the other  
17 classes you're pursuing as well?

18 MS. BALDWIN: No, your Honor. Those claims have  
19 virtually all been dismissed for the sake of the class members  
20 here.

21 THE COURT: Well, this is a mess, as you can imagine,  
22 and it will end up holding up these attorneys' fees; but I am  
23 not holding up this class settlement, and I will be imposing an  
24 appeal bond. This case has taken way too long, way too long,  
25 and these people need this money. As you pointed out, some

1 class reps have died already; and some people are not very  
2 sick, but there are a lot of people who are very sick, and I  
3 want the money out. And I'm trying to figure out what to do in  
4 terms of alerting the -- have you had success, any of the  
5 parties here, in alerting the First Circuit to how important it  
6 is not to take a year? Is there a way of expediting the  
7 appellate process through a motion?

8 MR. MATT: My recollection is, we did try that in GSK,  
9 and it was denied.

10 THE COURT: A motion to expedite?

11 MR. MATT: Yes.

12 THE COURT: I think you have a lot of judges on the  
13 First Circuit who, unfortunately for them, are now very  
14 familiar with this litigation.

15 MR. MATT: We can try again.

16 THE COURT: It may be worth the effort if everybody  
17 here signed onto it. That's not the attorneys' fees piece. So  
18 let me just ask you this. I've got these motions. I've heard  
19 enough to know that it's going to take a while. Does it make  
20 some sense to do depositions? Do you want me to refer it to a  
21 magistrate judge for fact finding?

22 MR. MATT: Let's keep it here for now, your Honor. We  
23 haven't started writing our opposition brief yet.

24 THE COURT: It's in everyone's interest to move this  
25 along quickly. And I don't know if you know, but, as you know,

1 I now have a job in Washington as well. I'm now carrying two  
2 jobs, and it's just not going to be quick. I don't have time  
3 to even slot you in.

4 MR. MATT: Understood, your Honor. Another thing we  
5 can do is, we can set aside the amount that's in dispute and  
6 perhaps do another attorneys' fee distribution. So there's  
7 ways to --

8 THE COURT: If you do my percentages and this number,  
9 how much money are you entitled to?

10 MR. MATT: For Track Two settlement?

11 THE COURT: Yes.

12 MR. MATT: I can tell you exactly actually. If you  
13 sign onto the order, there will be \$37 million for Track Two.

14 THE COURT: Well, so why don't we just, you get paid,  
15 I don't know, assuming -- we still have the appeal issue. Once  
16 the appeal is finalized, you'd get all but whatever they're  
17 asking for in attorneys' fees and expenses, and I hold that in  
18 escrow in the court, because you're getting a lot of money.

19 MR. EDELSON: Your Honor, as Mr. Matt pointed out, the  
20 majority of money they're seeking is for an Arizona state  
21 Lupron case, which has nothing to do with this at all.

22 MR. MATT: Lupron was never at issue in this case.

23 THE COURT: Right, so that would go away.

24 So are you pressing Lupron money?

25 MR. EDELSON: Yes.

1 MS. BALDWIN: Well, your Honor, if you're going to say  
2 that's going away, that's fine, but what's really important to  
3 us would be the coordinated AWP actions, which would be the  
4 ones filed -- in Arizona there was an AWP action, and in New  
5 Jersey there was an AWP action, and we have a plethora of  
6 e-mails between the signatories and lead counsel on the  
7 strategy.

8 THE COURT: That may be, but on this class that I  
9 fought so hard to get just right, I am not going to be  
10 providing attorneys' fees for drugs that were not involved in  
11 this litigation.

12 MS. BALDWIN: Understood, your Honor.

13 THE COURT: If there's a way of allocating drugs  
14 involved in this litigation, and if there was some sort of oral  
15 understanding, or misunderstanding, whichever way it goes, and  
16 you dismiss, which is they're relying to their detriment -- I  
17 know these firms. I know your firms. You don't just dismiss  
18 without some quid pro quo. You just don't. They must have  
19 understood something was about to happen. And so if you carve  
20 off Lupron, if you carve off other drugs that aren't involved  
21 with this, and any money, you know, for drugs that are still  
22 poking along in New Jersey, there may be a basis for a  
23 settlement. Otherwise, I'll take your -- why don't you -- it's  
24 3:30. Do you want this courtroom? Sit and schmooz and try and  
25 figure it out.

1 MS. BALDWIN: Your Honor, I think that they should be  
2 entitled to the right to respond, and I think that perhaps the  
3 attorneys talking might be the first step.

4 THE COURT: Well, both, but I'm simply saying, you are  
5 both going to spend a long time waiting for this. But I am  
6 telling you, at least unless I see it differently -- I haven't  
7 read your motion yet -- it's only going to be for drugs  
8 involved in this litigation.

9 MS. BALDWIN: I understand, your Honor, and many of  
10 these drugs were in this litigation, and lead counsel  
11 understood that our work was to benefit the class members of  
12 this litigation.

13 MR. MATT: We dispute that, your Honor, but we'll  
14 brief it.

15 THE COURT: Yes, you will, and then it's going to take  
16 a lifetime. But, then again, you may be waiting for the appeal  
17 anyway, so, so be it.

18 MR. MATT: We've heard you loud and clear. Thank you.

19 THE COURT: Okay. Did you want to say something?  
20 You're sitting there poking up every once in a while.

21 MS. BALDWIN: Your Honor, there was a joinder to our  
22 motion filed by Mr. Levy.

23 MR. LEVY: I just wanted to get that on the record,  
24 your Honor, because my name wasn't mentioned. My name is Adam  
25 Levy. I had filed a --



1 THE COURT: Where are you from?

2 MR. LEVY: Where am I from? I'm from outside of  
3 Philadelphia, your Honor.

4 THE COURT: I recognize that accent. Okay.

5 MR. LEVY: I've actually been here, and one of the  
6 witnesses that I helped prepare testified here in the BMS  
7 trial. But that was a long time ago, and yet I'm back, Adam  
8 Levy, and I joined in the motion for the fees and expenses from  
9 the state court cases. So I just wanted you --

10 THE COURT: Was that in addition to the \$2 million she  
11 mentioned, or the \$2 million is an aggregate --

12 MR. LEVY: I don't know if that was --

13 MS. BALDWIN: His numbers were not included because he  
14 wasn't a signatory to our motion, so his would be in addition  
15 to our numbers.

16 THE COURT: And how much are you talking about?

17 MR. LEVY: About \$400,000 of time. That's lodestar,  
18 your Honor.

19 THE COURT: And did you rely on any promises?

20 MR. LEVY: I was actually named in the agreement  
21 that -- between the e-mails that went back and forth between  
22 Mr. Specter and Mr. Berman, my name is actually in the  
23 agreement along with the other gentlemen whose firms are --

24 THE COURT: So answer is "yes," you believe that you  
25 were an intended beneficiary?

1 MR. LEVY: I do, your Honor.

2 MR. MATT: And just so the record is clear, Mr. Levy  
3 spent three years, if not more, in this case as part of Don  
4 Haviland's law firm, and that's going to be something that we  
5 talk about in our filing next week. And just so you know also  
6 for context, these are the folks that brought us Don Haviland,  
7 okay? This claim for these fees at this point are being  
8 brought by Shannon Specter's firm --

9 MS. BALDWIN: It's Shanin Specter.

10 MR. MATT: -- Shanin Specter, who brought us Don  
11 Haviland, and then withdrew as class counsel, saddling us in  
12 this court with Don Haviland for years, and we know where that  
13 led. So I would be remiss if I didn't put into context who  
14 they are.

15 THE COURT: Yes, but can I just say, \$37 million is a  
16 lot of money on top of everything else that you guys have  
17 gotten. So at this point you've been compensated for your  
18 attorney time and your expenses, and it would be useful to try  
19 and compromise. That having been said, I'm not paying a penny  
20 for any drug that wasn't involved in this litigation. So think  
21 of some proportionality in how to do this, all right? Okay,  
22 good. Happy Thanksgiving to everyone. I look forward to the  
23 briefs. No one is supposed to work on this over Thanksgiving,  
24 a direct judicial order.

25 MR. MATT: Thank you, your Honor.

1 MR. BARLEY: Thank you, your Honor. Happy  
2 Thanksgiving.

3 THE CLERK: All rise.

4 (Adjourned, 3:34 p.m.)

5 C E R T I F I C A T E

6  
7 UNITED STATES DISTRICT COURT )  
8 DISTRICT OF MASSACHUSETTS ) ss.  
9 CITY OF BOSTON )  
10

11 I, Lee A. Marzilli, Official Federal Court Reporter,  
12 do hereby certify that the foregoing transcript, Pages 1  
13 through 35 inclusive, was recorded by me stenographically at  
14 the time and place aforesaid in Civil Action No. 01-12257-PBS,  
15 In Re: Pharmaceutical Industry Average Wholesale Price  
16 Litigation, and thereafter by me reduced to typewriting and is  
17 a true and accurate record of the proceedings.

18 In witness whereof I have hereunto set my hand this 26th  
19 day of November, 2011.  
20  
21  
22  
23

24 /s/ Lee A. Marzilli

25 \_\_\_\_\_  
LEE A. MARZILLI, CRR  
OFFICIAL FEDERAL COURT REPORTER